Supreme Court, U.S.
FILED

97-177 JUL 22 1997

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Docket No. _____

In the Supreme Court
of the United States

October Term 1997

BEN ADAMS,
PHILIP JACKSON, Petitioners,

- versus -

CITY OF JERSEY CITY, Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Third Circuit to review its judgment at Docket Number 95-5537

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July 16, 1997.

43 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does *McDonald v. City of West Branch*, which held that arbitration under a collective bargaining agreement cannot preclude municipal employees' 42 U.S.C. § 1983 remedies, continue to be viable after *Gilmer v. Interstate/Johnson Lane Corp.*?

2. When it is undisputed that questions of job tenure could not be resolved under the collective bargaining agreement's grievance-arbitration clause, does this entitle Petitioners to bypass the grievance procedure and sue under § 1983 for deprivation of a protected property interest without due process of law?

PARTIES BELOW

The district court granted qualified immunity to former Jersey City Police Director Richard Harrison. Although the grant of immunity is questionable, the issue is not "certworthy." Therefore, Harrison is the one party below who is not being named as a party in this Court.

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REPORTS OF OPINIONS

The court below affirmed by judgment order "substantially for the reasons set forth by [District] Judge Ackerman in his opinion entered July 18, 1996." App. 1. See 1997 U.S. App. LEXIS 12064.

The district court opinion of July 16, 1996, is reproduced at App. 2, and has not been officially published. It makes reference to a May 7, 1996 opinion in this case, from which pertinent excerpts are reproduced at App. 23.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was announced on April 24, 1997. This Petition will be timely if filed no later than July 23, 1997.

Certiorari jurisdiction is established by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Due Process Clause, Amendment XIV, United States Constitution, provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ....

N.J.S.A. 40A:14-143, governing reductions in police department ranks for reasons of economy, is reproduced in the Appendix at App. 32.

Former N.J.S.A. 40:174-148, the George Act, conferring tenure on city detectives after five years of uninterrupted service, is reproduced in the Appendix at App. 32.

STATEMENT OF THE CASE

Petitioners served many years with "permanent" appointments as detectives in the Jersey City Police Department. Petitioner Adams' "permanent" appointment came in 1976. Petitioner Jackson became a "temporary" detective in 1979, and received a "permanent" appointment in 1984. As detectives, both enjoyed a premium pay rate with concomitant pension advantages, gold badges, plainclothes work, and prestige.

In 1989, each Petitioner lost his detective status and perquisites by administrative fiat. There was no accusation of misconduct and there was no opportunity for a fair hearing. At the time this happened, case law under 42 U.S.C. § 1983 had already established that "permanent" Jersey City detectives held a protected property interest in their positions, and could not be demoted except for cause shown at a fair hearing.

Petitioners therefore sued under § 1983. District Court jurisdiction is created by 28 U.S.C. §§ 1331, 1343(a)(3).

A. The detective position. Respondent City of Jersey City began

appointing detectives from its police officer ranks long before the advent of civil service.[1] Venerable municipal custom established that "temporary" promotions to detective were given to reward political support. With each change in the political winds, these detectives would be reduced to patrol officers and patrol officers who had supported the winning mayoral candidate would be made detectives. *Perez v. Cucci*, 725 F. Supp. 209, 214, 216-219 (D.N.J. 1989), *affirmed*, 898 F.2d 142 (3d Cir. 1990) (table); *Jersey City v. Babula*, 153 A.2d 712, 713, 56 N.J.Super. 533, 535-536 (App. Div. 1959).

When Jersey City placed its Police Department under New Jersey's civil service system, it chose to retain the special detective position without making "detective" a separate civil service "rank." This decision effectively exempted the detective position from the civil service system and permitted its

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1. The detective assignment evidently originated under the authority of New Jersey Public Laws of 1871, page 1137, section 98. App. 33.

continued use as a vehicle for political patronage.

Over the years, Jersey City also gave "permanent" promotions to detective status. "Permanent" promotions were awarded for outstanding police work.

B. Sources of tenure. Until 1988, detectives would acquire job tenure under New Jersey's George Act after five consecutive years in the position.[2] Respondent's own Police Department records from 1988 referred to Petitioner Adams as "tenured" under the George Act.[3]

Separate and apart from the George

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2. The George Act, former N.J.S.A. 40:174-148, provided that after five consecutive years, a detective on a city police force may not be "restored to the performance of duties ordinarily performed by patrolmen in such department except upon charges and after hearing." The George Act was repealed effective January 1, 1988, but the repealer preserved all fully-vested tenure protections.

3. Because Petitioner Jackson had been a "permanent" detective for only four years when the George Act was repealed, Respondent's records did not admit that he had tenure.

Act, settled case law held that long-standing custom, police regulations, and an ordinance protecting all Jersey City employees receiving an annual salary, objectively created a mutual understanding that even "temporary" detectives were protected against loss of their positions, badges and premium pay, except for cause. *Perez, supra*, 725 F. Supp. at 240-243; *Redfield v. Jersey City*, Civil No. 86-3869 (D.N.J.) (six figure jury verdict for reduction of detective to patrol officer without a hearing), *affirmed*, 937 F.2d 598 (3d Cir.) (table), *cert. denied*, 502 U.S. 940 (1991).

C. **Breaking tenure.** In September 1988, the Police Department announced a reorganization and issued job descriptions for a number of job titles. The document in question made no mention of "detectives." It substituted a new job title of "investigator," with a job description which covered many traditional detective activities.

The 1988 reorganization had no immediate practical effect. The change

in job title was generally ignored, and detectives continued to be called detectives. The change did not alter any duty assignments or activities. The change made no difference in any detective's pay, which was fixed by the collective bargaining agreement (CBA) at an annual rate higher than the pay rate for the most senior patrol officers.

Nine months after the reorganization, following the 1989 municipal elections, the new Police Director abolished by fiat the position and emoluments of detective. Purporting to act for reasons of economy, but having no lawful authority to do so,[4]

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4. The applicable statute, to which the Police Director paid lip service, is N.J.S.A. 40A:14-143. It requires that "the governing body of any municipality ... deem it necessary for reasons of economy" to "decrease the number of members and officers of the police department or force or their grades or ranks," before imposing any demotions or discharges for economic reasons. No finding of economic necessity was ever made by Jersey City's governing body, the City Council. Moreover, the Police Director did not honor the same enactment's requirement that those demoted be offered priority selection for open detective/investigator positions.

the Police Director announced that since there were no longer any detectives -- they had all been renamed "investigators" the previous year -- nobody was entitled to be paid at the "detective" scale specified in the CBA.

Petitioners were soon stripped of their gold badges, titles, prestige and premium pay. Petitioner Jackson was returned to patrol duties. Petitioner Adams, demoralized, subsequently took an early retirement.

D. The CBA and the Detective Pay Arbitration. Respondent had a CBA with the Jersey City Police Officers Benevolent Association. The CBA included a four step grievance and arbitration procedure for resolving certain disputes. Art. 24, App. 34.

The arbitration clause was a narrow one. It only extended to "grievances ... covered by this Agreement," rather than to all disputes arising between the parties. Art. 24.C, App. 34. The arbitrator was "without power or authority to make any decision ... which

violates or adds to the terms of this Agreement." *Id.*, Step Four ¶ 4, App. 36.

Any doubt as to the limited powers that were conferred on the arbitrator is dispelled by Article 24.B of the CBA. App. 34. It defined a "grievance" -- the prelude to arbitration -- narrowly, as

> any controversy arising over the interpretation or adherence to the terms and conditions of this Agreement.

The CBA's only real relevance to the present dispute was a wholly incidental one. The CBA fixed the amount of annual pay for those who, through procedures independent of the CBA, happened to be appointed detectives. Art. 33, App. 37.

Petitioners' union took to arbitration three cases relating to Respondent's total elimination of entitlement to the detective pay rate, a premium rate which the union had negotiated. App. 8. The union declined to arbitrate the total demise of detective tenure, because the job tenure claims were not based on any provision of the CBA. Absolutely nothing in the CBA governed how one could become,

or stop being, a "permanent" detective, just as nothing in the CBA governed the acquisition or loss of a civil service rank.

The arbitrator's pertinent ruling in the test cases[5] was that those who had been detectives (albeit they were now called "investigators") were entitled to continue receiving the detective pay rate if and only if they were actually assigned to investigative duties. The arbitrator, however, had no authority to decide who should perform investigative duties, because the CBA did not speak to this issue.

The arbitral ruling was of no benefit whatsoever to Petitioners. Petitioner

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5. The arbitrator also ruled that under the CBA, there should have been hearings before imposing any pay reductions, and ordered that belated hearings be offered to all who lost detective pay. The sole purpose of these contractual hearings, however, would be to assure that the pay reductions were not camouflaged disciplinary actions. Such a hearing could not have benefited Petitioners because there was no reason to believe that they were demoted for disciplinary reasons.

Adams was assigned primarily to administrative planning and Petitioner Jackson's primary assignment was firearms instructor.[6] Petitioner's did not select these assignments, which were interspersed with some investigative duties. Management in the exercise of its exclusive prerogative decided which detectives received these particular primary assignments and which were assigned primarily to investigative duties.

E. The federal litigation. After Petitioners learned of the union's determination that claims to tenure as detectives could not be arbitrated under the CBA, Petitioners filed suit under 42 U.S.C. § 1983. The Complaint asserted that by discontinuing service in the position, pay and prestige of detective without a hearing, defendants had "violate[d] [plaintiffs'] procedural and

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6. The tasks assigned to Petitioners continued to be performed long after the 1988 reorganization, even though these tasks were not included in any job description found in the reorganization document.

property rights" and "deprive[d] plaintiffs of their property interest" without due process of law.

On cross-motions for summary judgment, the district court specifically held that Jersey City would be precluded by prior litigation from disputing tenure claims if Petitioners could prove either of two facts, namely, (1) they each held the detective position "permanently," or (2) they each "receive[d] a fixed annual salary from the municipality." App. 28. Although neither of these crucial facts was ever disputed by the City, the court nevertheless granted summary judgment to the City rather than to Petitioners.

To reach that result, the district court, relying on *Dykes v. SEPTA*, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 1434, 134 L.Ed.2d 556 (1996), held that the CBA arbitration clause provided all of the process that was due, whether or not Petitioners pursued arbitration. App. 21.

That analysis would conform to circuit precedent if all that had been at issue

was the right to a hearing over contractual pay, but Petitioners were protesting a breach of job tenure on both procedural and substantive grounds. Indeed, precisely because there was no arbitral jurisdiction over the tenure claims, the City told the district court in its brief supporting summary judgment that "the issue which plaintiffs raise, whether they had acquired tenure as detectives ..., can only be resolved judicially."

Because detective tenure arose solely from outside the CBA and therefore could not be arbitrated, Petitioners' well-founded claims of job tenure were left with no forum for obtaining an impartial evaluation and protection of their federal rights. The trial court's ruling therefore was tantamount to holding that the mere existence of a CBA with an arbitration clause forecloses any § 1983 claim arising in the municipal workplace.

The court of appeals affirmed the trial court's decision "substantially for the reasons set forth by [the district judge]." App. 1. This Petition followed.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD CLARIFY WHETHER AND WHEN ARBITRATION UNDER A COLLECTIVE BARGAINING AGREEMENT FORECLOSES FEDERAL STATUTORY CLAIMS

A. A petition for certiorari to review *Pryner v. Thoesen Tractor Supply Co.*, 109 F.2d 354 (7th Cir. 1997), is pending before this Court at No. 96-1830, and a cross-petition is anticipated. In *Pryner*, the court of appeals grappled with the tension between two lines of decisions by this Court that also underlie the present Petition.

Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991), epitomizes the view that an individual's voluntary agreement to arbitration of most federal statutory claims is binding, absent a clear indication that Congress intended to preclude any waiver of judicial remedies. In contrast, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), held that prior arbitration under a CBA does not foreclose litigation of federal statutory claims for discrimination in employment violating

Title VII, 42 U.S.C. § 2000e; *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), held that voluntary submission of wage disputes to a CBA grievance forum does not prejudice a suit based on the same facts for minimum wages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; and *McDonald v. City of West Branch*, 446 U.S. 284 (1984), held that § 1983 claims are not precluded by the outcome of CBA arbitration addressing the same facts.

Gilmer distinguished the *Gardner-Denver* line of cases from the facts which it addressed. First, the *Gardner-Denver* cases did not involve an agreement to arbitrate statutory claims, but instead addressed the impact which CBA arbitration can have on subsequent judicial proceedings. Second, under the terms of the various CBAs, the claimants in the *Gardner-Denver* cases were represented by their unions, and the union and its aggrieved member may well have conflicting interests. 500 U.S. at 33-35.

Notwithstanding these distinctions, the two lines of authority have generated conflict in the courts of appeals.

Compare Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996) (Title VII claims are not subject to binding arbitration under a CBA), *cert. denied*, 117 S.Ct. 946 (1997); *Tran v. Tran*, 54 F.3d 115, 117-118 (2d Cir. 1995) (no need to arbitrate minimum wage claim under CBA), *cert. denied*, 116 S.Ct. 1417 (1996); *with Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir.) (Title VII and ADA claims are subject to binding arbitration under a CBA), *cert. denied*, 117 S.Ct. 432 (1996); *Martin v. Dana Corp.*, 114 F.3d 421 (3d Cir. 1997), *vacated and rehearing en banc granted*, 1997 U.S. App. LEXIS 17524 (July 1, 1997).

While acknowledging its own uncertainty, the *Pryner* panel concluded that *Gilmer* did not clearly overrule the *Gardner-Denver* line of cases, and that the union's qualified duty to represent members alleging employment discrimination is inadequate to assure a full and fair hearing of discrimination grievances under the CBA sufficient to displace litigation of statutory discrimination claims. 109 F.2d at 362-365.

In *Austin*, *supra*, the Fourth Circuit read *Gilmer* to flat out require discrimination claimants to exhaust CBA grievance-arbitration procedures before filing a federal suit.[7] *Austin* reached that result by imputing the voluntariness of the union's agreement to arbitrate to each and every person in the bargaining unit.

Austin's logic disregards *Gilmer*'s focus on

> the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee ....

500 U.S. at 35. By that language, *Gilmer* implicitly rejected any imputation to each union member of the voluntariness of the union's consent to arbitrate federal statutory claims.

While it purports to adhere to *McDonald*, the Third Circuit actually goes

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7. Outside the Fourth Circuit, *Austin* has been followed in *Jessie v. Carter Health Care Center, Inc.*, 930 F. Supp. 1174, 1176 (E.D. Ky. 1996).

beyond *Austin*. It holds that in § 1983 cases, "certain factual questions may be conclusively determined through collective bargaining," and "that determination of these factual issues precludes their being litigated further." *Dykes*, 58 F.3d at 1569.

That Third Circuit doctrine applies even if the union did not take the grievance to arbitration. The court below then imputes to the claimant a binding acquiescence in management's fact-finding during the pre-arbitration steps in the grievance procedure.[8] *Bolden v. SEPTA*, 953 F.2d 807, 828 (3d Cir. 1991) (en banc), *cert. denied*, 504 U.S. 943 (1992). That doctrine underlies this Petition, for it allows management to violate the law with impunity unless a labor arbitration is pursued and won.

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8. Stretching the notion of due process to the breaking point, the Third Circuit holds that the grievance findings are binding "even if the hearing conducted by the Employer . . . [was] inherently biased." *Dykes*, 58 F.3d at 1579, *quoting Jackson v. Temple University*, 721 F.2d 931, 933 (3d Cir. 1983).

Clearly, there is substantial conflict and confusion between and amongst the circuits, and something approaching chaos in the district courts. More specifically, there is uncertainty as to whether and when a claimant must exhaust grievance and arbitration procedures under a CBA as a precondition for litigating federal statutory claims in the district courts, and whether and when the outcome of the CBA grievance procedure is to substitute for or control the outcome of litigation of federal statutory claims. These important and recurring issues are ready for and deserving of this Court's attention and resolution.

B. Unlike *Pryner* and *Austin*, Petitioners' statutory claims arise under § 1983. There are at least two special reasons for not remitting § 1983 claims to CBA arbitration.

First. In *McDonald, supra*, this Court unanimously held that § 1983 claims are not precluded by the outcome of CBA arbitration. *Dykes* was guided by the

Third Circuit's *Bolden* decision. *Bolden*, while paying lip service to *McDonald*,[9] 953 F.2d at 825-826, avoided *McDonald*'s no-preclusion holding by declaring that a collective bargaining grievance opportunity can provide all the process that is due, thereby making the grievance procedure dispositive of the § 1983 claim.

As *Dykes* points out, a number of other circuits on a case-by-case basis have concluded that in a given case, the CBA grievance procedure provided due process of law. 68 F.3d at 1672 & n.6. The Third Circuit, however, has now gone much further. As Petitioners' case demonstrates, it no longer reviews the individual circumstances. Instead, it disposes of *all* municipal workplace cases by presuming that the CBA grievance-arbitration procedure meets all constitutional requirements. That doctrine deprives thousands of local

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9. In *Dykes* and in Petitioners' cases, the lower courts made no pretense of adhering to *McDonald*.

government employees of protections which Congress had bestowed and this Court has reaffirmed. Therefore, review and correction by this Court is appropriate.

Second. Distinguishing the *Gardner-Denver* line of cases, *Gilmer* explained:

> Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory claims.

500 U.S. at 35.

So, too, Petitioners, both individually and by their union, did not agree to arbitrate their statutory claims, and a CBA arbitrator would have had no authority to resolve their tenure claims. Consequently, the decisions below appear to conflict with *Gilmer*, and warrant clarification or correction by this Court.

C. *Gilmer* acknowledged "the tension between collective representation and individual statutory rights." 500 U.S.

at 35. That tension has spawned irreconcilable results in the circuits.

The Third and Ninth Circuits hold that the union member is stuck with a decision not to arbitrate, unless the member wins a suit for breach of the duty of fair representation. *Dykes*, 68 F.3d at 1571-72, *citing Armstrong v. Meyers*, 964 F.2d 948, 950 (9th Cir. 1992).

Pryner disagrees (109 F.3d at 362):

> [T]he union has broad discretion as to whether or not to prosecute a grievance. It may take into account tactical and strategic factors such as its limited resources and consequent need to establish priorities, just as other "prosecutors" must do, as well as its desire to maintain harmonious relations among the workers ....

Because of the "broad discretion" which unions enjoy in the selection of grievances to arbitrate, a suit for breach of the duty of fair representation can easily be lost even though the aggrieved member's underlying claim against the employer is clearly meritorious. Thus, the Third Circuit

effectively reposes in each union discretion to kill a member's valid § 1983 claim.

Dykes, which controlled the decisions below, cannot be reconciled with *Pryner* -- or for that matter with this Court's *McDonald* decision -- regarding the degree to which an individual union member's federal statutory protections must yield to what union leadership deems to be in the best interest of the membership collectively. In fact, the *Gilmer* Court's distinction of the *Gardner-Denver* line of decisions would be a distinction without a difference if the Third Circuit is correct.

It therefore is evident that this Court should immediately clarify whether and when union members must exhaust CBA arbitration procedures as a condition for litigating federal statutory claims, and the extent, if any, to which the outcome of the CBA grievance mechanism can foreclose litigation of a § 1983 claim.

2. THIS COURT SHOULD NOT COUNTENANCE A HOLDING THAT DUE PROCESS OF LAW CAN BE SATISFIED WHEN NO HEARING ON THE MERITS OF A PROPERTY DEPRIVATION IS AVAILABLE

There can be no doubt that Petitioners' job tenure as detectives constituted a protected property interest within the meaning of *Board of Regents v. Roth*, 408 U.S. 564 (1972). Therefore, deprivation of that property interest triggered the right to a meaningful hearing. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

While *Mathews* leaves for case-by-case determination exactly what process is due -- when the hearing must be granted and how it must be conducted -- there can be no doubt that at a minimum, the municipal employer must offer a hearing that will delve into the merits. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 546 (1985). *Cf. Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (due process requires "some kind of hearing").

Most recently, *Gilbert v. Homar*, 117 S.Ct. ___, 138 L.Ed.2d 120 (1997), held that the facts of the case did not require the state employer to provide any

hearing before suspending without pay a policeman who had been charged with a drug felony. Nevertheless, this Court remanded *Gilbert* for a determination of whether the post-suspension hearing was delayed too long to pass constitutional muster.

In Petitioners' case, eight years after the deprivation they still cannot obtain any tenure hearing.

The arbitrator's decision in the union's challenge to the end of premium detective pay repeated with evident approval the union's position: "If there is a property interest, then the officer may have other rights but those are independent of his rights under the CBA." As previously stated, Respondent later told the district court that "the issue which plaintiffs raise, whether they had acquired tenure as detectives ..., can only be resolved judicially." This was because the CBA arbitrator had no jurisdiction or authority to decide the tenure issue. Nevertheless, the lower courts held that the collective bargaining arbitration remedy provided Petitioners with all the process that was due for the loss of tenured detective

status.

Petitioners therefore were caught in a Catch-22 situation. The arbitrator and the federal courts each believed that the other had to resolve Petitioners' claims. This made their access to a hearing no less a chimera than that which Missouri once afforded prisoners who were required to select from a multitude of procedures but always seemed to select the wrong one in their challenges to conditions of confinement. *Wilwording v. Swenson*, 404 U.S. 249 (1971) (*per curiam*).

By leaving Petitioners with no chance for a meaningful hearing at all, the courts below nullified Congress' decision to provide a remedy in § 1983 for the arbitrary and lawless official actions such as those which Respondent visited upon Petitioners. Their protected property rights were destroyed by Jersey City, and neither Respondent nor the lower courts ever afforded them any genuine opportunity for a hearing on the merits.

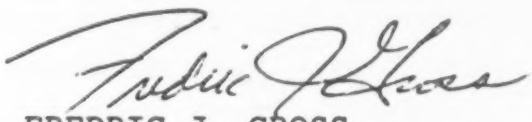
The district court imagined that union arbitration could resolve something which all parties recognized to be beyond the arbitrator's reach. Along the way, due

process of law, secured by the Fourteenth Amendment, got lost. The court of appeals' upholding of the dismissal of Petitioners' complaint is therefore so far afield from the usual course of justice, and so inimical to the very foundation of our system of government, that review and correction, perhaps summary correction, under this Court's supervisory powers is warranted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit at Docket Number 95-5537.

Respectfully submitted,



FREDRIC J. GROSS
Attorney for Petitioners

Of counsel: Susan E. Babb

July 16, 1997.

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5537

BEN ADAMS; PHILIP JACKSON

v.

CITY OF JERSEY CITY;
RICHARD J. HARRISON

Benjamin Adams and Philip Jackson,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-cv-02921)
District Judge: Hon. Harold A. Ackerman

Submitted Pursuant to Third Circuit LAR 34.1(a)
April 15, 1997

Before: SCIRICA, COWEN and NYGAARD, Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellants, it is ADJUDGED AND ORDERED that the judgment of the district court entered on July 18, 1996, be and is hereby affirmed, substantially for the reasons set forth by Judge Ackerman in his opinion entered July 18, 1996. Costs taxed against appellants.
ATTEST:

_____
Patricia S. Coleman, Acting Clerk

_____
CIRCUIT JUDGE
Dated: APR 2 4 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BENJAMIN ADAMS and PHILIP JACKSON,

Civ. Action No. 91-2921
(HAA) **OPINION**

v.

CITY OF JERSEY CITY and RICHARD J. HARRISON,
Defendants.

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Ackerman, D.J.

Plaintiffs, who are both members of the City of Jersey City Police Department, have brought this action pursuant to 42 U.S.C. § 1983, claiming that defendants have deprived them of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. This matter is now before the court on several motions by both parties.

Plaintiffs move (I) for reconsideration of the court's denial of their prior motion for summary judgment; (2) for, in effect, summary judgment on the issue of whether or not "plaintiffs' constitutional rights and their accrual of damages are . . . diminished by defendants' failure to assign investigative duties to plaintiffs;" and (3) for an in limine ruling barring defendants' from informing the jury of plaintiffs' other litigation. See Plaintiffs' Notice of Motion Defendants move (1) for summary judgment dismissing the remaining count of plaintiff Jackson's complaint on the basis of the entire controversy doctrine; and (2) for summary judgment dismissing plaintiffs' complaint on the ground that, because contractual grievance/arbitration procedures were available to them as members of a police officers' collective bargaining unit, plaintiffs were afforded due process.

For the reasons set forth below, defendants' motion for summary judgment is GRANTED.[1] Because this motion

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[1] I note that defendants did not file a notice of motion in connection with their "motion" for summary judgment that is now before the court. Rather, defendants "moved" for summary judgment in their opposition brief to plaintiffs' motion for reconsideration and other relief. This, however, is not a barrier to granting summary judgment in their favor. This is because "district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." Celotex Corporation v. Catrett, 477 U.S. 317, 326 (1986) (citations omitted)

is being granted, I need not address the other motions before the court, and therefore, those motions are DISMISSED.

I. Factual and Procedural Background[2]

In this case, the parties previously cross-moved for summary judgment. One of the arguments that defendants made in support of their previous motion was that "plaintiffs have received all the process which is their due in connection with their loss of detective pay supplements." See Defendants' Br. in Support of Summary Judgment Motion, dated May 11, 1992, at 29 [hereinafter "May 1992 Brief"] . More specifically, defendants argued, among other things, that, even assuming that the elimination of their detective pay differentials constituted a deprivation of a protected property interest, the grievance/arbitration procedures contained in the collective bargaining agreement entered into between plaintiffs' union, the Police Officers Benevolent Association of Jersey City, New Jersey, and the City of Jersey City provided the plaintiffs with due process. See id. at 34-35.

Although I did not address this specific issue in the opinion ruling on the cross-motions for summary judgment and although defendants did not cite the case law which they are citing in connection with their current motion (and which, as will be discussed below, I find to be dispositive of this case), this issue was clearly in play in the prior cross-motions. Thus, plaintiffs were on notice that they had to come forward with all their evidence regarding this issue. In addition, in plaintiffs' reply brief in connection with motions currently before the court, they respond to this issue and no where suggest that defendants' current motion is improperly before the court. For these reasons, I conclude that it is proper to rule on defendants' current motion for summary judgment

[2] I note that in the opinion ruling on the parties' prior cross-motions for summary judgment, I stated "[t]hat some of the evidence set forth in this section is not properly before the

Plaintiffs Benjamin Adams and Philip Jackson are police officers employed by the Jersey City Police Department ("JCPD").

Adams' Service Record indicates that he was appointed to the position of detective on May 17, 1976, when he was assigned to the Investigation Division. See Defendants' Ex. D. Adams' Service Record also indicates that he was reassigned to the Administrative Division on September 30, 1985. Id. However, in his declaration,

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court. The exhibits relied upon by defendants are merely attached to defendants' brief, and are not attached to a certification or affidavit." See Opinion, entered on May 8, 1996, at 2 n.1. I note that plaintiffs also relied on these exhibits in support of their previous motion. In any event, this situation has not been remedied with the parties' current motions. Defendants are still relying on the exhibits attached to their May 1992 Brief. In addition, plaintiffs rely on exhibits attached to their brief in support of the motion for reconsideration and other relief. In order to be properly before the court, these exhibits should be authenticated through a certification or affidavit and filed with the clerk's office.

Because the parties do not dispute the authenticity of any of these documents and do not object to them being considered, I will rule on the current motions despite the fact that the documents are not properly before the court. Cf. Bishop v. Okidata, Inc., 864 F. Supp. 416, 424 n.8 (D.N.J. 1994) (stating, in Title VII case where plaintiff's EEOC complaint was attached to plaintiff's brief, that "[a] court may properly consider undisputedly authentic documents attached to the motion papers of either party in deciding a Rule 12(b) (6) motion to dismiss") (citations omitted) . However, I am ordering both parties to properly file all exhibits proffered in connection with all of the summary judgment motions in this case within 15 days of the date on which the order accompanying this opinion is entered.

Adams states that he "continued to serve as a detective, without interruption, until 1989." Adams Dec. ¶ 4.

Jackson's Service Record does not indicate that he was ever assigned to the Investigation Division. See Defendants' Ex. E. However, it does indicate that he performed detective duties beginning on September 10, 1979 until he was transferred to the Administrative Division on March 18, 1987, where he was a Firing Range instructor. Id. Personnel Department records indicate that Jackson was promoted to the position of detective on June 20, 1984. Defendants' Ex. G. This was prior to Jackson's assignment to the Administrative Division. However, in his declaration, Jackson states that he "continued to serve as a detective, without interruption, until 1989." Jackson Dec. ¶ 5. Jackson's Service Record indicates that subsequently, on October 27, 1989, he was assigned to patrol duties. Defendants' Ex. E.

As a result of being detectives, the plaintiffs received an increase in their salary. The salary differential was paid pursuant to the collective bargaining agreement entered into between plaintiffs' union, the Police Officers Benevolent Association of Jersey City, New Jersey ("POBA"), and the City of Jersey City (hereinafter the "CBA"] . See CBA at 32 (attached as Exhibit C to May 1992 Brief) . The CBA contains a schedule of salaries that are based on the officer's length of service. Id. After the seventh year of service, the next salary level is for detectives. Id. Thus, the difference between the salary based on seven years of service and the salary paid to detectives is the detective pay differential. The detective pay differential was $1,800 per year at all times pertinent to this case. See Revised Final Pretrial Order, Stipulation of Facts, ¶ 6.

Article 24 of the CBA also provides for a grievance procedure. See CBA at 23. "Grievance" is defined as "any controversy arising over the interpretation or adherence to the terms and conditions of [the CBA] and may be raised by any Police Officer or the Association [i.e., the POBA] ."

Id. The CBA then sets forth a four step process which "constitutes the sole and exclusive method for resolving grievances between the parties covered by [the CBA] ." Id. at 23-24.

Step One of the process consists of the grievant submitting a written grievance within 30 days after the grievant became aware, or should have become aware, of the occurrence, but in no case more than 60 days after the occurrence. After the grievance is submitted, the grievant's immediate supervisor must render a written decision within 5 days of receipt of the grievance. Id. at 24. If Step One fails, then, within 5 days of the immediate supervisor's determination, the grievance is filed with the Division Commander. Id. The Division Commander must then render a written decision within 5 days of receipt of grievance. This is Step Two. Id. If Step Two fails, then the grievance goes to the Chief and/or the Director of Police. The Chief and/or Director must render a written decision within 10 days of receipt of grievance. This is Step Three. Id.

Step Four involves arbitration.

> If the grievance is not settled through Steps One, Two and Three, either party may refer the matter to the State Board of Mediation within ten (10) days after the determination by the Director or Chief. An arbitrator will be selected pursuant to the rules of the State Board of Mediation.

CBA at 24. The arbitrator is required to "hold a hearing promptly and shall issue his decision no later than thirty (30) days from the date of the close of the hearing . . . ." Id. at 25. "The arbitrator's decision shall be in writing and shall set forth his findings of fact, reasoning and conclusions on the issues submitted." Id. The CBA further provides that

> [n]othing herein will prevent any Police Officer from processing his own grievance, provided that the Association may be present at such hearings, and further provided that no settlement with any

such individual Police Officer shall violate this Agreement.

Id. (emphasis added).

On July 7, 1989, defendant Richard Harrison, who was the Chief of Police of the JCPD, issued General Order #23-89 which provided that

> [i]n accordance with N.J.S.A. 40A:14-143, at 0001 hours, Saturday, July 8, 1989, the salary differential of Detectives shall cease for reasons of economy.

Defendants' Ex. B.[3] As a result of this order, Jackson's extra detective compensation ceased on July 8, 1989. See Revised Final Pretrial Order, Stipulation of Facts, ¶ 8. For some reason, Adams' detective compensation did not cease until October 22, 1989. Id.[4] ¶ 7. Neither plaintiff was given a hearing prior to the reduction in compensation due to the July 8, 1989 order. Id. ¶ 9

The elimination of the pay differentials was the subject of several grievances filed by members of the POBA. Hearings were held on January 3, 1990 before Jeffrey Tener, who is an arbitrator with the New Jersey State Board of Mediation. Defendants' Ex. H, I. In an opinion dated January 27, 1990, the arbitrator made the following awards: (1) detectives who receive pay supplements cannot be reassigned to non-detective duties

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[3] [t]he governing body of any municipality, if they shall deem it necessary for reasons of economy, may decrease the number of members and officers of the police department or force or their grades or ranks.

[4] In their brief in support of their motion for reconsideration, plaintiffs state that the stipulation is incorrect, and that plaintiff Adams also ceased receiving the detective pay differential on July 8, 1989. See Plaintiffs' Brief in Support of Reconsideration at 16 & n.10. This dispute, however, is irrelevant to the disposition of this motion

without notice and hearing; (2) detectives who had waived the additional compensation, or who never received it were not entitled to an award of back pay; and (3) only officers doing investigative work (i.e., those assigned to the Investigation Division or to the Special Investigations Unit) are entitled to receive detective pay supplements. See Defendants' Ex. H. In his opinion, the arbitrator also stated that

> [a]n employee's property interest is said not to be controlling. The parties' agreement speaks of compensation. That is what the POBA relies on. If there is a property interest, then the officer may have other rights but those are independent of his rights under the collective bargaining agreement.

Id. at 5.

Subsequently, both parties to the arbitration entered into a consent judgment, that was filed in the New Jersey Superior Court, confirming the arbitration. See Defendants' Ex. I.

Thus, as a result of this decision, the detective salary differential was reinstated, retroactively, only to those police officers engaged in investigative, i.e., detective, functions within the Investigation Division or the Special Investigations Unit. See Revised Final Pretrial Order, Stipulation of Facts, ¶ 4. At the time the decision was implemented, neither plaintiff was performing investigative duties. See id. ¶ 5. Therefore, the plaintiffs did not receive the detective pay differentials.

I note that there is nothing in the record to suggest that either plaintiff filed an individual grievance in connection with the elimination of the pay differentials or to suggest that they participated in any way in the arbitration proceeding. However, it is clear that if they had been performing detective duties at the time the arbitration decision was implemented, then they would have received the pay differentials, and thus, benefitted from the arbitration. See. e.g., Plaintiffs' Brief in Support of

Reconsideration at 17 (in moving for ruling that plaintiffs' damages continue to accrue even after the arbitration, plaintiffs' stated that "[t]here also will be no dispute that...after confirmation of the arbitral award, those police... performing investigative functions have been awarded salary at the detective rate, and nothing stopped defendants from assigning plaintiffs to perform investigative functions"). Therefore, it appears that the POBA, in effect, arbitrated this issue on behalf of all police officers affected by the elimination of detective pay differentials.[5]

On June 3, 1991, plaintiffs brought this action against defendants City of Jersey City and Police Chief

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[5] This conclusion is buttressed by the New Jersey Superior Court, Appellate Division's opinion in Jersey City Police Officers Benevolent Assoc. v. City of Jersey City, 257 N.J. Super. 6 (App. Div. 1992), which dealt with the arbitration and consent judgment discussed above. Due to an ambiguity in the consent judgment, the POBA brought an action for an order compelling the City to pay the detective differentials to all officers functioning as investigators irrespective of their length of employment. The City cross-moved for an order modifying the consent judgment to make clear that the arbitration award applied only to investigators who have served seven or more years with the Department. See id. at 10-11. The Appellate Division did not decide this issue. Rather, the court directed that this dispute be submitted for supplementary arbitration. Id. at 15. There is nothing in the record regarding the result of the supplemental arbitration.

In any event, there is no dispute that officers who have been on the police force for more than seven years and were performing investigative duties were entitled to the detective pay differential under the arbitration. Both plaintiffs Adams and Jackson have served more than seven years. Therefore, if they were performing investigative functions, then they would be entitled to the detective pay differential.

Richard Harrison, in both his official and individual capacity. In Count I of the complaint, both plaintiffs assert that the elimination of the pay differential, without notice and a hearing, constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. In Count 2, defendant Jackson claims that the defendants' transferring of him to patrol duties in October of 1989, without a hearing, constitutes a deprivation of property without due process of law.

In May of 1992, defendants moved for leave to amend their Answer to plead two affirmative defenses, and simultaneously moved for summary judgment on the proposed affirmative defenses. According to plaintiffs' brief, these motions "were put on hold to enable plaintiffs to take discovery on the issues raised in the proposed affirmative defenses." Plaintiffs' Br. at 1. Discovery was completed and the pretrial order was filed in June 1993. Defendants' renewed this motion in April of 1996. At that time, plaintiffs cross-moved for partial summary judgment as to liability. Additionally, plaintiff Jackson cross-moved for leave to amend his pleadings to include an additional claim for relief.

In an Opinion, entered on May 8, 1996, I denied both parties' motions for summary judgment, with the exception of defendant Harrison's motion for summary judgment on the defense of qualified immunity, which was granted. In addition, I granted defendants' motion to amend their answer, and denied Jackson's motion to amend the complaint. Although this is not reflected in the order, I also held that Jackson's claim in Count 2 of the complaint was waived because he failed to set forth in the Revised Final Pretrial Order any facts he intends to prove regarding this claim. See Opinion, entered on May 8, 1996, at 11 n.3. In the alternative, I held that this claim was barred by the New Jersey Entire Controversy Doctrine. See id. at 26 n.4. Therefore, after this decision, only Count 1 of the complaint remains.

Plaintiffs now move (1) for reconsideration of the court's denial of their motion for summary judgment; (2) for, in effect, summary judgment on the issue of whether or not "plaintiffs' constitutional rights and their accrual of damages are diminished by defendants' failure to assign investigative duties to plaintiffs;" and (3) for an in limine ruling barring defendants' from informing the jury of plaintiffs' other litigation. See Plaintiffs' Notice of Motion. Defendants move (1) for summary judgment dismissing the remaining count of plaintiff Jackson's complaint on the basis of the entire controversy doctrine; and (2) for summary judgment dismissing plaintiffs' complaint on the ground that, because contractual grievance/arbitration procedures were available to them as members of a police officers' collective bargaining unit, plaintiffs were afforded due process.

Because I conclude that, due to the grievance/arbitration procedures available to plaintiffs through the CBA, plaintiffs received due process, I will not address the other motions.

II. Standard for Summary Judgment

Federal Rule of Civil Procedure 56 provides that summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). See also Todaro v. Bowman, 872 F.2d 43, 46 (3d Cir. 1989); Chippolini V. Spencer Gifts, Inc., 814 F.2d 893, 896 (3d Cir.), cert. dism'd, 483 U.S. 1052 (1987). In other words, "summary judgment may be granted if the movant shows that there exists no genuine issue of material fact that would permit a reasonable jury to find for the nonmoving party." Miller v. Indiana Hospital, 843 F.2d 139, 143 (3d Cir.), cert. denied, 488 U.S. 870 (1988).

The substantive law will identify which facts are "material." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-248 (1986). Therefore, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. Id.

The party seeking summary judgment always bears the initial burden of production, i.e., of making a prima facie showing that it is entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This may be done either by demonstrating there is no genuine issue of fact and that as a matter of law, the moving party must prevail or by demonstrating the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. Id. at 322-23. Once either showing is made, the burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden as well as establish the existence of genuine issues of material fact. Id. at 324.

However, at the summary judgment stage, a court may not weigh the evidence or make credibility determinations- - these tasks are left to the factfinder. Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993). Therefore, to raise a genuine issue of material fact, "'the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." Id. See also Anderson, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant] .")

If the court determines that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law, then summary judgment may be granted.

III. Discussion

In their complaint, plaintiffs assert that by eliminating the detective pay differential that plaintiffs were receiving, without a hearing prior to the elimination, the defendants violated the Fourteenth Amendment of the United States Constitution. Plaintiffs brought this action pursuant to 42 U.S.C. §1983. Defendants argue that due to the grievance/arbitration procedures available to plaintiffs through the CBA, due process requirements have been satisfied.

Section 1983 provides, in part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. §1983. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of . . . property, without due process of law." U.S. Const. amend. XIV, § 1.

Thus, in order to prevail on a section 1983 claim based on the Fourteenth Amendment, plaintiffs must prove that they were deprived of a property interest under color of state law without due process. See Dykes v. Southeastern Pennsylvania Transportation Authority, 68 F.3d 1564, 1570 (3d Cir. 1995) cert. denied, 116 S. Ct. 1434 (1996). For the purposes of this motion, I assume that plaintiffs' interest in the detective pay differential constituted a property interest

that was subject to Fourteenth Amendment protection. Furthermore, it is clear that plaintiffs were deprived of this by defendants under color of state law. Therefore, the focus of this opinion is on the question of due process.[6]

In Dykes, the Court of Appeals addressed the question of whether grievance procedures outlined in a collective bargaining agreement can satisfy due process requirements. Dykes filed suit pursuant to section 1983 against the Southeastern Pennsylvania Transportation Authority ("SEPTA") and the Transport Workers' Union of Philadelphia, AFL-CIO, Local 234 ("Local 234"). The Court of Appeals summarized the allegations of Dykes' complaint as follows:

> On July 13, 1993, Dykes, a bus driver employed by SEPTA and represented by Local 234, drove a SEPTA bus along his regular route. At some point during the trip, SEPTA supervisors boarded the bus, ordered Dykes out of the driver's seat, and asked that he submit to body fluids tests designed to detect the presence of drugs and alcohol. Dykes refused to submit to those tests, and, as a result was fired. Following Dykes' discharge, Local 234 pursued three levels of grievance proceedings. At each stage, it was determined that the tests requested were based on reasonable suspicion and

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[6] I note that in the previous summary judgment opinion in this case, I concluded that there were genuine issues of material fact regarding whether plaintiffs had a property interest in the detective pay differentials, thereby precluding summary judgment. See Opinion, entered on May 8, 1996, at 10-20. In this opinion, however, I am assuming that plaintiffs do have a protected property interest. In addition, there are no genuine issues of material fact regarding the nature of the grievance/arbitration procedures that were available to plaintiffs. Therefore, before the court now is the legal issue of whether or not these undisputed procedures afforded plaintiffs with due process within the meaning of the Fourteenth Amendment. For this reason, summary judgment is proper on the record before the court.

> Dykes' discharge was upheld. The union did not submit the matter to arbitration.

Dykes, 68 F.3d at 1565-66. In one of the counts of his complaint, Dykes alleged that SEPTA and Local 234 deprived him of a property interest in his employment without due process of law as required by the Fourteenth Amendment.

More specifically, Dykes challenged the role of SEPTA and Local 234 in the post-termination grievance proceedings. Local 234 was said to have "allow[ed] SEPTA . . . to get away with what [the Union] knew to be violations of plaintiff's due process rights even though [the Union] had the power to prevent such violations and a duty to try to do so." Dykes claimed that Local 234 failed to obtain and present meaningful evidence in his own behalf. The Union was said to have "aided and abetted" and "acted in concert with SEPTA in effecting the deprivation of plaintiff's due process rights."

Id. at 1566. Defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12 (b) (6). The district court granted the motion and Dykes appealed.

For the purposes of the appeal, the court assumed that Dykes was deprived of a protected property interest under color of state law and focused only on the question of due process. The court noted that " [w] e must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." Dykes, 68 F.3d at 1571 (quoting Kremer v. Chemical Construction Corp., 456 U.S. 461, 483 (1982)) (internal quotation marks omitted). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Id. (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976)) (internal quotation marks omitted)

In deciding whether or not the grievance/arbitration procedures available to Dykes satisfied due process requirements, the Court of Appeals relied on the Ninth Circuit's opinion in Armstrong v. Meyers, 964 F.2d 948 (9th Cir. 1992). In Armstrong, a discharged university employee filed suit pursuant to section 1083, alleging that he had been deprived of property without due process of law.

In affirming a grant of summary judgment for the defendants, the Court of Appeals for the Ninth Circuit held that "[a] public employer may meet its obligation to provide due process through grievance procedures established in a collective bargaining agreement, provided, of course, that those procedures satisfy due process." Armstrong, 964 F.2d at 950 (quoted in Dykes, 68 F.3d at 1571). The court then turned to the following balancing test established by the Supreme Court in Mathews v. Eldridge, 424 U.S. at 335. In order to determine whether a particular procedure meets due process requirements, three factors must be considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Armstrong, 964 F.2d at 950 (quoting Mathews, 424 U.S. at 335).

Applying these factors in the public employee context, theArmstrong court recognized that an employee's interest in retaining he [sic] job is "substantial." Id.

> However, the risk of an erroneous determination in the grievance/arbitration procedure is not large, and the value of additional or substitute procedures is not great. Grievance/arbitration procedures are a universally accepted method of resolving

> employment disputes, included in countless collective bargaining agreements. Although [the] union could and did decide not to take [the employee's] claim to arbitration, it did so under a duty of fair representation, and may be sued for breach of that duty if its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."

Id. at 950 (citation omitted) (quoted in Dykes, 68 F.3d at 1572). In holding that the grievance/arbitration procedures in place were adequate to meet the demands of due process, the Ninth Circuit recognized "the strong public and private interest in maintaining an effective grievance/arbitration process to settle disputes between employers and employees." Id. at 951 (quoted in Dykes, 68 F.3d at 1572).

Our court of appeals was

> convinced that the reasoning of Armstrong v. Meyers applies with equal force in [Dykes] . Even where, as here, a plaintiff alleges that the defendants acted in concert to deprive him both of a meaningful hearing and of arbitration, we believe that the administrative process in place has incorporated safeguards adequate to resolve these allegations in a manner consistent with the demands of due process. Significantly, Dykes could have asked a court of common pleas to order arbitration pursuant to the collective bargaining agreement, thereby assuring him of the due process to which he was entitled. Because he chose not to do so, Dykes is unable to prove a violation of 42 U.S.C. §1983 by SEPTA or by Local 234. We conclude, therefore, that Count II of Dykes' complaint was appropriately dismissed for failure to state a cause of action.

Dykes, 68 F.3d at 1572 (footnotes omitted) . The Court of Appeals also stated that " [i]n so holding, we re-confirm our agreement with many courts holding that grievance procedures outlined in collective bargaining agreements can satisfy due process." Id. at 1572 n.6 (citing Wallace v. Tilley, 41 F.3d 296 (7th Cir. 1994) (grievance procedure outlined in collective bargaining agreement can satisfy due process even in cases where public employee has discharged); Buttitta v. City of Chicago, 9 F.3d 1198,

1206 (7th Cir. 1993) (due process satisfied where police officer had access to post-deprivation grievance procedure under collective bargaining agreement) ; Narumanchi v. Bd. of Trustees of Conn. State Univ., 850 F.2d 70, 72 (2d Cir. 1988) (hearing rights available to discharged professor under the collective bargaining agreement fully satisfied procedural due process even where there were unsubstantiated claims of bias) ; Lewis v. Hillsborough Transit Authority , 726 F.2d 664, 667 (11th Cir. 1983) (per curium) (although discharged employee did not pursue post termination grievance procedure, due process was satisfied because, grievance procedure, if utilized, could eliminate constitutional violation), cert. denied, 469 U.S. 822 (1984); Ash v. Bd. of Educ. of Woodhaven School Dist., 699 F.2d 822, 827 (6th Cir. 1983) (grievance procedure satisfied minimum requirements of due process)) . See also Jackson v. Temple University, 721 F.2d 931 (3d Cir. 1983) (holding that where a due process claim is raised against a public employer, and grievance and arbitration procedures are in place, those procedures may satisfy due process requirements)

Applying Dykes (along with the other cases cited above) to the case now before the court, it is clear that defendants have not committed a due process violation.

First, the private interest affected in this case is not as significant as that in Dykes. In Dykes, the private interest at stake was an employee's interest in retaining his job, an interest which the Court of Appeals stated was "substantial." Dykes, 68 F.3d at 1572. In case now before the court, plaintiffs were merely deprived of a portion of their salary (i.e., the $1,800 detective differential) . While this is not an insignificant interest, it is certainly less significant than an employee's interest in retaining his job.

Second, the procedures available to plaintiffs Adams and Jackson are similar to those that were available to Dykes. In both situations, multi-level grievance arbitration procedures were available. Furthermore, unlike Dykes, in this case there is not a claim that plaintiffs' union,

the POBA, acted in any manner adverse to plaintiffs' interests. Therefore, the grievance/arbitration procedures outlined in the CBA afforded plaintiffs' due process.

That neither plaintiff seems to have filed a grievance challenging the elimination of the detective pay differentials does not detract from this conclusion. It should be noted that plaintiffs could have pursued their grievances with or without the assistance of the POBA. CBA at 25 ("[n]othing herein will prevent any Police Officer from processing his own grievance, provided that the Association may be present at such hearings") Thus, if plaintiffs failed to take advantage of these procedures, then plaintiffs, not the defendants, caused any deprivation of due process. See Dykes, 68 F.3d at 1572 (holding that, because plaintiff chose not to ask a court of common pleas to order arbitration, he was unable to prove a violation of section 1983) Lewis, 726 F.2d at 667 (holding that, because plaintiff failed to utilize post-termination grievance procedures, "any deprivation of that due process clearly resulted from Plaintiff's own inaction")

In addition, although plaintiffs do not seem to have filed grievances, the POBA has, in effect, arbitrated this issue on behalf of all police officers affected by the elimination of the pay differentials. As discussed above, there is no a dispute that if plaintiffs were performing investigative functions, then they would receive the detective pay differential, in accordance with the arbitration award. The fact that plaintiffs are not performing investigative functions, and therefore, are not receiving the pay differential, does not detract from the conclusion that the availability of the arbitration provided them with due process. As the Court of Appeals for the Seventh Circuit has stated

> [t] he mere deprivation by state action of a constitutionally protected interest is not itself unconstitutional. What is unconstitutional it the deprivation of such an interest without due process of law. "The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions.'" Collins V. City of Harker Heights, –

U.S. --, 112 S. Ct. 1061, 1070, 117 L.Ed.2d. 261 (1992) (quoting Bishop v. Wood, 426 U.S. 341, 350, 96 S. Ct. 2074, 2080, 48 L.Ed.2d 684 (1968)).

Wallace, 41 F.3d at 299-300 (emphasis in original)

Lastly, plaintiffs' only argument in opposition to the proposition that the grievance/arbitration procedures afforded them with due process is based on the following language in the arbitrator's opinion:

> An employee's property interest is said not to be controlling. The parties' agreement speaks of compensation. That is what the POBA relies on. If there is a property interest, then the officer may have other rights but those are independent of his rights under the collective bargaining agreement.

Defendants' Ex. H at 5. Based on this language, plaintiffs argue that "the arbitrator resolved only contractual issues. The arbitral award reserved any due process claims to independent litigation." Plaintiffs' Letter Br., dated June 11, 1996, at 3. Furthermore, " [p] recisely because the arbitration was inadequate to resolve plaintiffs' claims, it does not meet the requirements of Dykes v. SEPTA, 68 F.3d 1564 (3d Cir. 1995), under which some arbitration procedures satisfy procedural due process." Id.

I do not find plaintiffs' argument persuasive. This is because the role of the grievance/arbitration procedures is not to determine whether or not plaintiffs have been afforded due process. Rather, the role of the grievance/arbitration procedures is to afford plaintiffs with due process. In other words, the grievance/arbitration procedures is the process. As discussed above, the grievance/arbitration procedures outlined in the CBA provided the plaintiffs with due process, regardless of whether or not they chose to take advantage of that process.

Therefore, I conclude that there is no genuine issue of material fact and that, as a matter of law, defendants did not deprive plaintiffs of property without due process of law, in violation of the Fourteenth Amendment.

IV. Conclusion

For the reasons set forth above, defendants' motion for summary judgment is **GRANTED**. Because this motion is being granted, I need not address the other motions before the court, and therefore, those motions are **DISMISSED**. Also, both parties are ordered to properly file all exhibits proffered in connection with all of the summary judgment motions in this case within 15 days of the date on which the order accompanying this opinion is entered.

May 6, 1996 District Court Opinion Excerpts
Adams & Jackson v. City of Jersey City, et al.
Docket # 91-2921 (HAA)

Ackerman, D.J.

I. Factual and procedural Background[7]

Plaintiffs Benjamin Adams and Philip Jackson are police officers employed by the Jersey City Police Department ("JCPD")

Adams' Service Record indicates that he was appointed to the position of detective on May 17, 1976, when he was assigned to the Investigation Division. See Defendants' Ex. D. Adams' Service Record also indicates that he was reassigned to the Administrative Division on September 30, 1985. Id. However, in his declaration, Adams states that he "continued to serve as a detective, without interruption, until 1989." Adams Dec. ¶4.

Jackson's Service Record does not indicate that he was ever assigned to the Investigation Division. See Defendants' Ex. E. However, it does indicate that he performed detective duties

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[7] I note that some of the evidence set forth in this section is not properly before the court. The exhibits relied upon by defendants are merely attached to defendants' brief, and are not attached to a certification or affidavit. See Fed.R.Civ.P. 56(e) ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith."). In any event, plaintiffs have not objected to this defect. In addition, defendants' motion for summary judgment is being denied -- with the exception of defendant Harrison's claim for qualified immunity. However, in ruling on the qualified immunity issue, I no where relied on evidence improperly before the court.

beginning on September 10, 1979 until he was transferred to the Administrative Division on March 18, 1987, where he was a Firing Range instructor. Id.; Jackson Dec. ¶15. Personnel Department records indicate that Jackson was promoted to the position of detective on June 20, 1984. Defendants' Ex. G. This was prior to Jackson's assignment to the Administrative Division. However, in his declaration Jackson states that he "continued to serve as a detective, without interruption, until 1989." Jackson Dec. ¶5. Jackson's Service Record indicates that subsequently, on October 23, 1989, he was assigned to patrol duties. Defendants' Ex. E.

As a result of being detectives, the plaintiffs received an increase in their salary. The salary differential was paid pursuant to the police officer's union contract. See Defendants' Ex. C at 32. The differential was $1800 per year at all times pertinent to this case. See Final Pretrial Order, Stipulation of Facts, ¶6. In other words, as detectives, plaintiffs earned $1800 more per year than they did as patrol men.

On July, 1989, defendant Richard Harrison, who was the Chief of Police of the JCPD, issued General Order #23-89 which provided that

> [i]n accordance with N.J.S.A. 40A:14-143, at 0001 hours, Saturday, July 8, 1989, the salary differential of Detectives shall cease for reasons of economy.

Defendants' Ex. B. N.J.S.A. 40A:14-143 provides, in part, that

> [the] governing body of any municipality, if they shall deem it necessary for reasons of economy, may decrease the number of members and officers of the police department or force or their grades or ranks.

As a result of this order, Jackson's extra detective compensation ceased on July 8, 1989. See Final Pretrial Order, Stipulation of Facts, ¶8. For some reason, Adams' detective compensation did not cease until October 22, 1989. Id. ¶7. Neither plaintiff was given a hearing prior to the reduction in compensation on July 8, 1989. Id. ¶9.

The elimination of the pay differentials was the subject of several grievances filed by the Police Officers Benevolent

Association of Jersey City ("POBA"). Hearings were held on January 3, 1990 before Jeffrey Tener, who is an arbitrator with the New Jersey State Board of Mediation. Defendants' Ex. H. The arbitrator noted that both the City and the POBA "acknowledge that there is not a Civil Service title of 'detective.' Being a 'detective' is a job assignment. It refers to a function, not a rank." Defendants' Ex. H at 3. On January 27, 1990, the arbitrator made the following awards: (1) detectives who receive pay supplements cannot be reassigned to non-detective duties without notice and hearing; (2) detectives who had waived the additional compensation, or who never received it were not entitled to an award of back pay; and (3) only officers doing investigative work (i.e., those assigned to the Investigation Division or to the Special Investigations Unit) are entitled to receive detective pay supplements. See id. Subsequently, both parties to the arbitration entered into a consent judgment, that was filed in the New Jersey Superior Court, confirming the arbitration. See Defendants' Ex. I. Apparently, under the terms of the consent judgment neither plaintiff was entitled to the pay differential because neither was performing investigative functions.

On June 3, 1991, plaintiffs brought this action against defendants City of Jersey City and Police Chief Richard Harrison, in both his official and individual capacity. In Count I of the complaint, both plaintiffs assert that the elimination of the pay differential, without notice and a hearing, constitutes a deprivation of property without due process of law in violation of the fourteenth amendment of the Constitution of the United States. In Count 2, defendant Jackson claims that the defendants' transferring of him to patrol duties in October of 1989, without a hearing, constitutes a deprivation of property without due process of law.

In May of 1992, defendants moved for leave to amend their Answer to plead two affirmative defenses, and simultaneously moved for summary judgment on the proposed affirmative defenses. According to plaintiffs' brief, these motions "were put on hold to enable plaintiffs to take discovery on the issues raised in the proposed affirmative defenses." plaintiffs' Br. at 1. Discovery was completed and the pretrial

order was filed in June 1993. Now these motions are back before the court. In addition, plaintiffs cross-move for partial summary judgment as to liability. Additionally, plaintiff Jackson cross-moves for leave to amend his pleadings to include an additional claim for relief.

Plaintiffs make two arguments in support of their claim that the detective pay differentials could not be eliminated except for cause. First, plaintiffs argue that defendants are collaterally estopped from asserting that detectives in the JCPD have protected property interest in their assignments as detectives (and therefore, have a protected interest in the detective pay differentials), based on the following two cases: Perez v. Cucci, 725 F. Supp. 209 (D.N.J. 1989), aff'd, 898 F.2d 139 (3d Cir. 1990) (TABLE) and Redfield v. City of Jersey City, 1989 WL 4956 (D.N.J. Jan. 23, 1989). Second, plaintiffs argue that they have a protected property interest in their assignments as detectives pursuant to a New Jersey statute, called the George Act.

1. Collateral Estoppel or Issue preclusion

The doctrine of collateral estoppel, which is also known as issue preclusion, "derives from the simple principle that later courts should honor the first actual decision of a matter that has been actually litigated." Burlington Northern Railroad Company v. Hyundai Merchant Marine Co., Ltd., 63 F.3d 1227, 1231 (3d Cir. 1995) (quotation omitted) . "This doctrine ensures that once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Id. (quotation omitted) . The prerequisites for the application of issue preclusion are satisfied when (a) the issue sought to be precluded is the same as that involved in the prior action, (b) the issue was actually litigated, (3) it was determined by a final and valid judgment, and (4) the determination was essential to the final judgment. Id. at 1231-32 (citations omitted)

First, plaintiffs rely on Perez v. Cucci, 725 F. Supp. 209 (D.N.J. 1989) aff'd, 898 F.2d 139 (3d Cir. 1990) (TABLE) . In this case, plaintiff Perez brought an action against, among

others, the City of Jersey City. Perez was a police officer on the JCPD. Effective October 11, 1982, plaintiff was promoted to the position of detective, and received both a title change from police officer to detective, and a concomitant salary increase in the amount of approximately $1248. Id. at 215. Plaintiff continued in the position of paid detective until July 1, 1985 when he was demoted to the rank of patrolman. Id. Plaintiff received no prior notice of the demotion and was not afforded a hearing prior to the demotion. Id. at 241. At the bench trial that was conducted before me, the issue was whether plaintiff's civil rights were violated when he was demoted from the rank of patrolman because he had openly espoused the candidacy of a mayoral incumbent who was defeated in his reelection bid in 1985. Id. at 212. Among other claims, plaintiff asserted that his demotion, without prior notice or a hearing, constituted a deprivation of property without due process of law in violation of the fourteenth amendment. See id. at 240-43.

In the bench trial opinion, I found that in 1961 the JCPD promulgated the "Rules and Procedures of the Jersey City Police Department." Id. at 243. These rules provided that:

> Any permanently employed officer or employee who receives a fixed annual salary from the municipality shall not be suspended, removed, fined or reduced from office or employment therein except for just cause and then only after written charges and complaint shall have been preferred.

Id. I concluded that this departmental regulation "creates a protected property interest in employment as a Jersey City police officer, for those employees who are 'permanent' or 'receive a fixed annual salary from the municipality.'" Id.

The evidence in the record revealed that Perez received a fixed annual salary from the municipality. Id. Therefore, he could not be removed or reduced from office absent "just cause." Id.

> As the existence of a just-cause requirement grants plaintiff a protected property interest in his position..., plaintiff could be deprived of the continued retention of his position only in accordance with due

> process. Since plaintiff has demonstrated that the demotion deprived him of a property interest, and since there is no dispute that defendants did not afford him any procedural protections, plaintiff has demonstrated that his demotion, absent notice and hearing, violated due process.

Id. Thus, in Perez, I found that Jersey City officers have a protected property interest in their employment if they are "permanent" or "receive a fixed annual salary from the municipality."

> The defendant in this case, the City of Jersey City, was a defendant in Perez. In addition, the issue of whether a detective on the JCPD has a protected property interest in that position (i.e;, the issue sought to be precluded in this case) is the same as that involved in Perez. Also, the issue was clearly actually litigated in Perez and was also determined by a final and valid judgment. Lastly, the determination of the issue was essential to the final judgment on plaintiff's due process challenge in Perez. Therefore, the defendants in this case are precluded from arguing that a detective on the JCPD who either { holds that position "permanently" or "receives a fixed annual salary from the municipality" with respect to that position does not have a protected property interest in that position. Se Burlington 63 F.3d at 1231-32 (citations omitted)

However, summary judgment cannot be granted as to liability based on this conclusion. This is because there is a genuine issue of material fact regarding whether or not plaintiffs meet the criteria for possessing a protected property interest in the position of detective. As stated above, the detective pay differential was eliminated on July 8, 1989. Both plaintiffs state in their declarations that they continued to serve as a detective, without interruption, until 1989. See Adams Dec. ¶4; Jackson Dec. ¶5. However, both their service records indicate that they were assigned to the Administrative Division in July 1989. See Defendants' Ex. D, E. For this reason, among others, it is impossible to determine on the record now before the nature of each plaintiff's respective job position. I also note that in the arbitration decision submitted by the defendants, the arbitrator

noted that the use of the title detective "has been far from consistent." Defendants' Ex. H. For example, apparently some detectives held the title of detective but did not receive the extra compensation. Id. I only mention this because it suggests that determining whether any police officer in the JCPD has a protected property interest in the position of detective is a fact specific inquiry, because the title detective does not seem to have a consistent meaning. Therefore, although my ruling that defendants are collaterally estopped based on Perez, the factfinder must still determine whether as a factual matter plaintiffs fall within the parameters of Perez.

Plaintiffs also rely on Redfield v. City of Jersey City, 1989 WL 4956 (D.N.J. Jan. 23, 1989) in support of their collateral estoppel argument. In this case, plaintiff Redfield sued the City of Jersey City and Police Director Harrison among others. Redfield was promoted from patrolman to detective in 1980. He performed off-duty uniformed security work to supplement his income. While working performing this off-duty work at a nightclub, a fellow Jersey City police officer was involved in a fight outside the nightclub. Plaintiff did not come to his aid, and the police officer who was in the fight accused plaintiff of failing to come to his aid and of being derelict in his duties. On October 11, 1984, Harrison demoted plaintiff from detective to patrolman. See id. at *1.

In an opinion ruling on defendants' motion for summary judgment, Judge Sarokin held first that

> the state's law is clear: to obtain a permanent appointment to a position recognized by the civil service system, a person must complete the civil service examination and certification procedures. Since Redfield did not complete such procedures prior to his job change to detective he cannot base his asserted interest on [New Jersey case law]

Id. at *7 However, Judge Sarokin still denied defendants' motion for summary judgment. He held that the evidence regarding plaintiff's salary increase, the provisions of the collective bargaining agreement, and internal departmental rules (the same one relied upon in Perez), created a triable issue of

fact regarding whether there was an implied contract between the defendants and Redfield that he could not be removed from his position of detective absent cause. See id. at *8-*9. More specifically, Judge Sarokin concluded that

> plaintiff should be allowed to establish at trial that, based upon custom and practice, as well as existing regulations and agreements, those appointed as detectives in the [JCPD] . . . underst[toodl that loss of the designation of detective for purported disciplinary purposes would entitle the individual involved a hearing.

Id. at *9

Plaintiffs state in their brief that it could be judicially noticed that a verdict was returned in Redfield in favor of plaintiff. Plaintiffs have provided no documentation with respect to this verdict. I am not suggesting that plaintiffs are not being truthful when they assert that the jury found for the plaintiff in Redfield. However, in order to determine whether collateral estoppel applies, plaintiffs in this case must present the court with a proper basis (e.g., a copy of the judgment or verdict sheet) so the court to determine whether the prerequisites of collateral estoppel have been met. Because this information is lacking I cannot rule on plaintiffs' collateral estoppel argument with respect to Redfield.

2. The George Act

The George Act provides that

> whenever, in any police department of any city of the first class in this state, any member of such department shall have been appointed or designated as detective under or by authority of a resolution of the governing body of such city, and by and with the consent of the state civil service commission, and shall have performed the duties of such detective for a period of five years, he shall not hereafter be reduced in rank or restored to the performance of duties ordinarily performed by patrolmen in such department except upon charges and after a hearing. Hereafter any such person shall hold the rank of detective in such department and be entitled to the emoluments thereof.

N.J.S.A. 40:174-148 (attached as exhibit 2 to Gross Declaration) The statute was saved from repeal on July 1, 1971 by N.J.S.A. 40A:14-172. However, it was subsequently

repealed, effective January 1, 1988, by N.J.S.A. 40A:61-8. In repealing the Act, the New Jersey Legislature, provided that "[n]o officer, who attained tenure by any provision of any section herein repealed by section 40A:61-8 of this act, shall be affected in any way by such repeal." N.J.S.A. 40A:61-6h.

Because the George Act provides that detectives that meet the Act's prerequisites cannot be reduced in rank or restored to the performance of duties ordinarily performed by patrolmen in such department except upon charges and after a hearing, the George Act creates a protected property interest. See Richardson, 856 F.2d at 509. The parties do not dispute this. They do, however, dispute whether the plaintiffs met the prerequisites of the Act prior to its repeal in January 1, 1988. As discussed above, on the record now before the court, there are genuine issues of material fact regarding whether or not and/or for what time periods plaintiffs were detectives. Therefore, the issue of whether either plaintiff may claim a protected property interest pursuant to the George Act must be put to the factfinder, i.e., the jury.

N.J.S.A. 40A: 14-143 provides:

> The governing body of any municipality, if they shall deem it necessary for reasons of economy, may decrease the number of members and officers of the police department or force or their grades or ranks. In case of demotion from the higher ranks, the officers or members to be so demoted shall be in the inverse order of their appointment. When the service of members or officers is terminated, such termination shall be in the inverse order of their appointment. Any member or officer who is demoted or whose service is terminated by reason of such decrease shall be placed on a special employment list, and in the case of subsequent promotions, a person so demoted shall be reinstated to his original rank and in the case of termination of service and new appointment, prior consideration shall be given to the persons on said special employment list.

The George Act, former N.J.S.A. 40:174-148 (repealed effective Jan. 1, 1988), provided:

> Whenever, in any police department of any city of the first class in this state, any member of such department shall have been appointed or designated as detective under or by authority of a resolution of the governing body of such city, and by and with the consent of the state civil service commission, and shall have performed the duties of such detective for a period of five years, he shall not hereafter be reduced in rank or restored to the performance of duties ordinarily performed by patrolmen in such department except upon charges and after a hearing. Hereafter any such person shall hold the rank of detective in such department and be entitled to the emoluments thereof.

New Jersey Public Laws of 1887, page 1137, section 98, provided, in pertinent part:

> That the said board [of police commissioners] shall exercise all powers, and be charged with all duties expedient for or incident to the police government of Jersey City; they shall have the power to appoint a chief of police, at a salary not exceeding twenty-five hundred dollars per annum; so many captains of police as they may deem necessary, at a salary not to exceed thirteen hundred dollars per annum to each; so many sergeants of police and detectives as they may deem necessary, at a salary not exceeding twelve hundred dollars per annum to each; and so many patrolmen as they may deem necessary, at a salary not exceeding eleven twelve hundred dollars per annum to each; * * *.

Excerpts from Collective Bargaining Agreement (CBA)

Jan. 1, 1988 through Dec. 31, 1990

Articles 24 and 33

ARTICLE 24

CONTRACTUAL GRIEVANCE PROCEDURE

A. **Purpose.**

1. The purpose of this procedure is to secure, at the lowest possible level, an equitable solution to the problems which may arise affecting the terms and conditions of this Agreement and to resolve grievances as soon as possible so as to assure efficiency and promote Police Officers' morale. The parties agree that this procedure will be kept as informal as may be appropriate.

2. Nothing contained herein will be construed as limiting the right of any Police Officer having a grievance to discuss the matter informally with the Director or Chief of the Department and having the grievance adjusted, provided the Association is present and the settlement does not violate the contract.

B. **Definition.** The term "grievance", as used herein, means any controversy arising over the interpretation or a adherence to the terms and conditions of this Agreement and may be raised by any Police Officer or the Association.

C: **Steps of the Grievance Procedure.** The following constitutes the sole and exclusive method for resolving grievances between the parties covered by this Agreement and will be followed in its entirety unless any step is waived by mutual consent.

Step One.

1. A grievant will institute action under the provisions hereof by submitting a written grievance within thirty (30) days after the grievant became aware, or should have become aware, through diligent inquiry, but in no event more than sixty (60)days after the occurence [sic] of the event being grieved, and an earnest effort will be made to settle the difference between the aggrieved and the immediate supervisor for the purpose of resolving the matter informally. Failure to act within the period set forth above will be deemed to constitute an abandonment of the grievance.

2. The immediate supervisor will render a decision in writing within five (5) days after receipt of the grievance.

Step Two

1. In the event the grievance is not settled through Step One, it will be filed with the Division Commander within five (5) days following the determination by the immediate supervisor.

2. The Division Commander or his designee will render a decision in writing within five (5) days from receipt of the grievance.

Step Three.

1. In the event the grievance has not been resolved through Step Two, then within five (5) days of receipt of the determination of the Division Commander or his designee, the matter may be submitted to the Chief of the Department or the Director.

2. The Chief and/or Director will submit a written answer within ten (10) days from receipt of the grievance.

Step four.

1. If the grievance is not settled through Steps One, Two and Three, either party may refer the matter to the State Board of Mediation within ten (10) days after the determination by the Director or Chief. An arbitrator will

be selected pursuant to the rules of the State Board of Mediation.

2. However, no arbitration hearing will be scheduled sooner than thirty (30) days after the aggrieved elects to pursue his Civil Service remedies, the arbitration hearing will be cancelled [sic] and the matter withdrawn from arbitration, and the Association will pay all costs incurred by the City as a result of such improper submission.

3. The arbitrator so selected shall confer with the representatives and hold a hearing promptly and shall issue his decision no later than thirty (30) days from the date of the close of the hearing, or if oral hearing has been waived, then from the date the final statements and proofs on the issues are submitted to him.

4. The arbitrator's decision shall be in writing and shall set forth his findings of fact, reasoning and conclusions on the issues submitted. The arbitrator shall be without power or authority to make any decision which requires the commission of an act prohibited by law or which is violative of or adds to the terms of this Agreement. He shall be bound by the provisions of this Agreement and restricted to the application of the facts presented to him involving the grievance and render a decision in accordance with the weight of the evidence. The decision of the arbitrator shall be submitted to the City and the Association and shall be final and binding on both parties.

5. The cost for the services of the arbitrator, including per diem expenses, if any, and actual and necessary travel, subsistence expenses, and the cost of the hearing room shall be borne equally by the City and the Association. Any other expenses incurred shall be paid by the party incurring them.

6. Nothing herein will prevent any Police Officer from processing his own grievance, provided that the Association may be present at such hearings, and further

provided that no settlement with any such Individual Police Officer shall violate this Agreement.

7. In the event an employee pleads guilty to disciplinary charges at a departmental hearing, the only arbitable issue shall be "was the penalty imposed reasonable." This paragraph shall apply only to disciplinary action which is not reviewable to Civil Service only if a final legal determination results in a decision that such matters are arbitrable.

8. No Police Officer shall be discharged, disciplined, reprimanded, reduced in rank, compensation, position, or deprived of any employment advantage or given an adverse evaluation of his service without just cause. Any such action asserted by the City or any agent or representative thereof shall be subject to the grievance procedures set forth herein, including binding arbitration. The grievant shall elect arbitration or pursuit of Civil Service remedies, but not both. This paragraph shall apply only to disciplinary action which is not reviewable to Civil Service only if a final legal –determination results in a decision that such matters are arbitrable.

ARTICLE 33
SALARIES, LONGEVITY & SERVICE DIFFERENTIAL

A.Salaries. Police Officers will receive compensation in accordance with the following schedule:

	1/1/88	1/1/89	1/1/90	
Istyear	20,225	21,649	23,1 60	
2ndyear	21,771	23,304	24,931	
3rd year	25,043	26,806	28,677	
4th year	26,462	28,325	30,302	
5th year	28,098	30,076	32,476	(includes 301 s.d.)
6th year	31,354	33,561	36,246	(inctudes 336 s.d.)
7th year	34,848	37,301	40,650	(includes 746 s.d.)
Detective	36,448	38,901	42.394	(inc~udes 778 s.d.)

1. the City reserves the right to raise entry level salaries.

2. Class of 85' will move to the 7th step effective December 31, 1990 at one minute before midnight, which is the time of expiration of this Agreement. It is agreed and understood that any economic wage adjustment resulting from this early move to 7th step is waived by the Association.

B. **Longevity.** Police officers will receive an annual longevity payment in accordance with the following schedule:

beginning first day of year	% of pay	through the last day of year
4	2	7
8	4	11
12	6	15
16	8	19
20	10	22
23	12	24
25	14	each thereafter
	32	

C. **Service Differentials.**

1. All Police Officers will receive a service differential in accordance with the following for 1988 and 1989:

Beginning 1st day of the year	% of base pay
5	1
12	1.5
16	2

2. In lieu of the service differential, the following dollar amounts have been added to the base pay effective January 1, 1990, and the figures for 1990 set forth in A above include these amounts. Service differential will no longer be paid as of January 1, 1990.

Steps 1-4	$ 0
Step 5	301
Step 6	336
Step 7	746
Detective	778

3. A Police Officer who is hired up to October 31 of any year will be given full credit for the year of service retroactive to January 1 of that year. Anyone hired thereafter will receive no credit for that year, but will receive credit on January 1st following the first anniversary of the date of hire.

Supreme Court, U.S.
FILED
AUG 29 1997
CLERK

No. 97-177

In The

Supreme Court of the United States

October Term, 1996

BEN ADAMS and PHILIP JACKSON,

Petitioners,

versus

THE CITY OF JERSEY CITY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

The Jersey City Police Department has operated under a Collective Bargaining Agreement with its members for many years. Traditionally, the Agreements provided that individuals designated as "detectives" received a stipend above their normal salaries. (Pet. App. 37). In most years, this stipend amounted to less than $2,000. (Pet. App. 32). The title "detective" is not one recognized by the New Jersey Civil Service Commission. It has been described as a "job assignment," not as a rank.

On July 7, 1989, Richard Harrison, as chief of the Jersey City Police department, issued a General Order terminating the salary differential paid to detectives. Philip Jackson and Ben Adams filed a two-count complaint, in count one, alleging that both plaintiffs had been denied a property interest in receiving Detective's pay. (Pet. App. 11). The second count of the Complaint alleged that Jackson was assigned inappropriate activities without procedural due process. (Pet. App. 11).

At the time of Chief Harrison's Order, Adams was assigned to the Administrative Planning Division where he worked on the department's computer system. He had been designated as a "detective" on May 17, 1976. Jackson was assigned to the Police Academy as a firearms instructor. He had been designated "detective" on June 20, 1984. Neither appointment was done by a resolution of the City Counsel or with the consent of the state civil service commission.

The elimination for the pay differential for detectives was the subject of several grievances filed by the Police Officers Benevolent Association on behalf of its members.

The State Board of Mediation held a hearing on January 3, 1990 which was presided over by Jeffrey B. Tener as arbitrator. The opinion issued by Mr. Tener summed up all of the arguments that had been advanced by the City and the grievants. A good deal of time was spent by the arbitrator on the issue of the "detective" title.

Mr. Tener was convinced that the question of who should receive detective pay was one that could only be answered by examining the function that the officers performed. Consequently, he found that only officers assigned to the Investigation Unit and Special Investigations were entitled to the pay differential. This decision was confirmed by the Superior Court of New Jersey in an Order signed by Judge Robert Tarleton on May 31, 1990. Under the terms of this Order, neither Adams nor Jackson (who were both assigned to the Administrative division) were entitled to receive the pay differential.

The George Act, N.J.S.A. 40:174-148 was enacted in 1920. (Pet. App. 32). The Act was repealed by N.J.S.A. 40A:61-8, effective January 1, 1988. *Id.* The George Act required that a "detective" be appointed by a resolution of the governing body of the municipality. *Id.* Neither Adams nor Jackson was ever appointed by such a resolution. The "LaBate Grievance" cited by the appellants has no place in the instant case. LaBate complained of his assignment to a "non-investigative" position. The appellants were free to do the same under the non-contractual procedure set forth in the Collective Bargaining Agreement. Neither Adams or Jackson filed such a grievance. LaBate did file a grievance and subsequently was reassigned to "investigative" duties.

The appellants' position that they held "permanent promotions to detective" finds no support in the law of the State of New Jersey. Neither Adams nor Jackson met the threshold requirement of having been appointed by **resolution** of the governing body. No detective in Jersey City was appointed this way. As described at length in the arbitration decision, the City considered the position of detective to be an assignment, not a rank. Reference to the decision in *Perez v. Cucci*, 725 F.Supp. 209 (D.N.J. 1989) aff'd, 898 F.2d 142 (3rd Cir. 1990) has no bearing on the case at bar as Petitioners make no claim that they were singled out on the basis of their political affiliation. Under the Article 24B of the terms of the Collective Bargaining Agreement between the City of Jersey City and the Police Officers Benevolent Association (POBA), of which Adams and Jackson were members, individual officers were afforded the right to institute grievance procedures. (Pet. App. 34). Neither Ben Adams or Philip Jackson availed themselves of this right, declining to bring or join any grievance of the General Order.

In his decision granting Summary Judgment to the City, Judge Ackerman, U.S.D.J., noted that only Count I of Petitioner's Complaint, concerning elimination of pay differential without notice and hearing remained for decision. (Pet. App. 11). Count II of the Complaint, in which Petitioner Jackson alleged that his transfer to patrol duties without hearing violated due process requirements, had been waived by Jackson's failure to set forth any facts regarding that claim in the Revised Final Pretrial Order. (Pet. App. 11).

ARGUMENT

I. THE DECISION BELOW AFFORDED COMPLETE REVIEW OF COLLECTIVE BARGAINING GRIEVANCE/ARBITRATION PROCEDURE AND FOUND FULL COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS FOR DUE PROCESS.

A. THE COURT BELOW APPLIED THE CRITERIA ESTABLISHED BY THE SUPREME COURT IN *MATTHEWS V. ELDRIDGE*, 424 U.S. 319, 96 S.CT. 833, 47 L.Ed.2d 18 (1976) IN DETERMINING THAT BEN ADAMS AND PHILIP JACKSON HAD BEEN AFFORDED DUE PROCESS.

Although Petitioners frame their petition for certiorari as one involving the preclusion of federal jurisdiction by an arbitration proceeding under a collective bargaining agreement, no such issue is presented in the instant matter.

The underlying complaint brought by Petitioners, Ben Adams and Philip Jackson, contained two counts. In the first cause of action, both petitioners alleged that elimination of the pay differential, without notice and hearing, constitues a deprivation of property without due process. (Pet App. 11) The claim for detective pay was based on a salary schedule established by the terms of the collective bargaining agreement (Pet. App. 37).

Petitioner's pay differential was terminated by General Order of Jersey City Police Chief, Richard Harrison on July 7, 1989, which eliminated the salary differential for all "Detectives" effective July 8, 1989. In addition, the assignment of detective was rescinded by General Order #20-88, which substituted the title of Investigator, and

provided the relevant job description. Following the General Orders, several grievances were filed by the Police Officer Benevolent Association on behalf of their members. The matter was arbitrated, pursuant to the procedure established by Article 24 of the collective-bargaining agreement (Pet. App. 34-36) by the New Jersey State Board of Mediation. One of the issues considered by the arbitrator, Jeffrey B. Tener, was who was entitled to a pay differential for performing the investigative work previously performed by detectives. The arbitrator, after hearing both sides, determined that the important consideration is the work performed and the compensation. The arbitrator determined that only officers performing investigative functions (i.e., with responsibility for crime scenes and continuing investigation) were entitled to receive the pay differential. These were officers assigned to the Investigation and Special Investigation Units. The arbitrator's decision was confirmed by the New Jersey Superior Court in an Order signed by Judge Robert Tarleton on May 31, 1990. Neither of the Petitioners had filed a grievance over loss of assignment or pay. By the terms of the arbitration award, neither of the Petitioners was entitled to differential pay.

Petitioners subsequently filed suit claiming they had been deprived of their property interest in receiving detective's pay (First Cause of Action), (Pet. App. 11) and that Officer Jackson had been deprived of his property interest in assignment to duties commensurate with his rank. (Second Cause of Action), (Pet. App. 11)

Petitioners complaint was heard by the Honorable Harold A. Ackerman, U.S.D.J. who granted the City's Motion for Summary Judgment by Order dated July 16,

1996. (Pet. App. 3) Judge Ackerman determined that the City had not violated due process in depriving officers Adams and Jackson of their property interest in a salary differential. (Pet. App. 21) In arriving at his decision, Judge Ackerman considered whether the grievance procedures used to determine which officers were entitled to a salary differential met the criteria established in *Dykes v. Southeastern Pennsylvania Transportation Authority*, 68 F.3d 1564 (3rd Cir. 1995), *cert. denied*, 116 S.Ct. 1434 (1996) for review of collective bargaining grievance procedures. (Pet. App. 19)

Petitioner alleges that in *Dykes*, the Third Circuit created a presumption that grievance arbitration procedures established by municipal collective bargaining agreements meet all constitutional requirements. This allegation constitutes a gross misstatement of both the holding in *Dykes*, and Judge Ackerman's application of the *Dykes* holding to the instant matter.

In *Dykes*, the court explicitly recognized that the collective bargaining grievance procedure must satisfy the balancing test used by the Ninth Circuit in *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992) and established by the Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319, 334-335, 96 S.Ct. 833, 903, 47 L.Ed.2d 18, ___ (1976). The *Dykes* court reviewed the procedure available to Dykes including his recourse to state court action against his union for breach of duty of fair representation. *Dykes*, 68 F.3d at 1571. The *Dykes* opinion clearly stated that "where an *adequate* grievance/arbitration procedure is in place and is followed, a plaintiff has received due process to which he is entitled under the Fourteenth Amendment" *Dykes*, 68 F.3d at 1564. (emphasis added). Similarly the

Court noted that, "In so holding, we re-confirm our agreement with the many courts holding that grievance procedures outlined in collective bargaining agreements *can* satisfy due process requirements. *Id.* at 1572, n.6 (emphasis added). Nothing in the *Dykes* holding creates a presumption, as alleged by Petitioners, that all municipal grievance procedures established by a collective bargaining agreement satisfy constitutional requirements, and obviate the need for case-by-case review.

In applying the *Dykes* holding to the case at bar, Judge Ackerman determined that the *Matthews* criteria has been met by the collective bargaining procedure available to Adams and Jackson. (Pet. App. 19-20). Petitioners were thus afforded full review by a federal court of the process afforded to petitioners by the terms of the City's collective bargaining agreement.

B. THE CLAIMS OF BEN ADAMS AND PHILIP JACKSON CONCERNING DENIAL OF DUE PROCESS WERE DETERMINED IN A FEDERAL FORUM AND WERE NOT FORECLOSED BY THE COLLECTIVE BARGAINING GRIEVANCE/ARBITRATION PROCEDURE.

Nothing in the decision rendered by Judge Ackerman as upheld by the Court of Appeals holds that arbitration under a collective bargaining agreement forecloses or determines federal statutory or constitutional claims. In fact, the district court and Court of Appeals decisions below reviewed and decided Petitioners' § 1983 claims. The gravamen of Petitioners' complaint is that they were deprived of a property interest without due process of law in violation of the Fourteenth Amendment. In other

words, the *process* available to Petitioners to resolve their claims is the basis of the suit. Petitioners, Adams and Jackson, were not denied a hearing on the constitutionality of the process. The decisions below applied the criteria required by the Supreme Court in *Matthews v. Eldridge*, 424 U.S., 319, 96 S.Ct. 833, 47 L.Ed.2d 18 (1976), and found that the Petitioners had not been denied due process.

Petitioners have misapplied the decisions in *McDonald v. West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed 302 (1984), *Pryner v. Tractor Supply Company*, 109 F.3d 354 (7th Cir. 1997), *Gilmer v. Interstate*, 500 U.S. 20, 111 S.Ct. 1647, 144 L.Ed.2d 26 (1991) and *Alexander v. Garden-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) and its progeny. These cases all consider, on various factual bases, the role of grievance/arbitration procedures in determining employee's complaints based on federal statutory or constitutional rights. No decision was made by *an arbitrator* that the arbitration/grievance procedure available to Petitioners comported with constitutional requirements. That determination was made by Judge Ackerman and upheld by the Court of Appeals. There is no conflict between the decision rendered on Officers Adams and Jackson complaints with the cases cited by Petitioners. These case would be relevant *only if* a determination had been made by an arbitrator that the procedures established by the controlling collective bargaining agreement met constitutional muster. No such claim was brought before the arbitrator, and no such opinion was rendered by him. As Judge Ackerman stated in his decision, "[T]he role of the grievance/arbitration procedures is not to determine whether or not plaintiffs

have been afforded due process. Rather, the roles of the grievance/arbitration procedure is to afford plaintiffs with due process" (Pet. App. 21).

Petitioners were not denied appropriate review of the process to ascertain compliance with due process requirements. Officers Adams and Jackson were afforded a considered determination in the federal courts that the collective bargaining agreement available to them (which they declined to utilize) provided due process of law in determining their loss of salary

In Count II of the complaint, Officer Jackson alleged that the City had transferred him to patrol duties in October, 1989, without a hearing depriving him of property without due process of law. (Pet. App. 11). Judge Ackerman decided that Officer Jackson had failed to set forth in the Pretrial Order any facts he intended to prove regarding such claim and thus had waived that claim. (Pet. App. 11). Officer Jackson's complaint of denial of due process in reassignment to patrol duties was not foreclosed by arbitration – it was waived by his own failure to prosecute the claim.

Finally, Petitioners seem to argue that their complaint evidences a conflict between individual rights and the interest of collective representation. There is no such conflict evidenced by the facts of this case. Pursuant to the terms of collective bargaining agreement at issue herein, the Petitioners were given full access to the grievance/arbitration procedure in Article 24. The agreement provides in Article 24, Section B Definition:

> The term "grievance", as used herein, means any controversy arising over the interpretation

> or adherence to the terms and conditions of agreement and may be raised by any Police Officer or Association. (Pet. App. 34)

Therefore, unlike the plaintiff in *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (1997), Petitioners were empowered by the contract to bring grievances on their own behalf. The court in *Pryner* noted in arriving at its decision, "Most important, the grievance and arbitration procedure can be invoked only by the union and not by the worker." *Id.* at 362. Thus, no tension existed here, as in *Pryner*, between Petitioners' rights and the Union's interest. Petitioners' arguments to the contrary are a clear misstatement of the facts of this case.

II. PETITIONERS HAVE NOT BEEN DEPRIVED OF A PROTECTED PROPERTY INTEREST WITHOUT DUE PROCESS BECAUSE PETITIONER JACKSON WAIVED HIS JOB TENURE CLAIM FOR FAILING TO COMPLY WITH JUDGE ACKERMAN'S PRE-TRIAL ORDER.

In count one of the Complaint, both Petitioners alleged that the Respondent eliminated the premium pay differential without due process. (Pet. App. 11) In count two of the Complaint, Petitioner Jackson asserted that his reassignment to patrol duties constituted a deprivation of a property interest without due process of law. (Pet. App. 11). On May 8, 1996, Judge Ackerman held that Petitioner Jackson waived count two of the Complaint because he failed to comply with the Revised Final Pretrial Order requiring him to set forth the facts that he intended to prove at trial. (Pet. App. 11). Consequently, Judge Ackerman decided only the issue of whether the Petitioners

were denied due process on the pay differential claim. (Pet. App. 12).

Petitioners now erroneously claim that the lower courts denied Petitioner Jackson due process by failing to provide a hearing on the merits for a claim that he waived. Petitioners' claim of a Catch 22 situation is an attempt to mischaracterize the facts to obtain another chance at reviving his waived claim.

As to whether the Petitioners were denied a hearing on the merits on their pay differential claim, Judge Ackerman wisely applied the three part test[1] of *Matthews v. Eldridge*, 424 U.S. at 335, to whether the grievance/arbitration procedures available to Petitioners comported with due process. (Pet. App. 14-21). In his opinion, Judge Ackerman noted that the Third Circuit recognized in *Dykes v. Southeastern Pennsylvania Transportation Authority*, that grievance/arbitration procedures contained in a CBA may satisfy due process requirements. (Pet. App. 15). Applying the three-part *Matthews* test, the district court found that similar to the situation in *Dykes*, the private interest at issue was not very significant, multi-level grievance procedures were available and that unlike

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[1] Three factors must be considered when deciding whether a particular procedures satisfies due process: "First the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews*, 424 U.S. at 335.

Dykes, the Petitioners did not claim their Union failed to advance their interests. (Pet. App. 19-20). Furthermore, Petitioners could have filed a grievance without the assistance of their union and their failure to pursue the matter was the cause of any deprivation of due process. (Pet. App. 20). Moreover, the district court found that although Petitioners did not file grievances, their union did arbitrate the pay differentials. The union successfully won reinstatement of back pay for individuals performing investigative duties, but since both Petitioners were not performing investigative duties, they were not entitled to back pay. (Pet. App. 20).

Finally, Petitioners assert that because the arbitrator did not address the issue of job tenure and Respondent's admission that the tenure claim could only be resolved judicially, they have been denied due process. (Pet. Cert. 25). Petitioners, however, fail to advise the Court that Petitioner Jackson waived this claim through his inability to comply with the Pretrial Order. Consequently, the Petitioners have not suffered a deprivation of due process.

CONCLUSON

Petitioners were not foreclosed by an arbitration decision from obtaining a determination in the federal court that they had been afforded due process in deprivation of a salary differential. Petitioners' claims of violation of due process were fully reviewed by the Honorable Harold A. Ackerman, U.S.D.J. who determined that Petitioners had suffered no due process violation. This decision was upheld by the U.S. Court of Appeals for the

Third Circuit. Petitioner Jackson's claim of violation of due process by assignment to patrol duties was waived by his failure to set forth any facts in proof of the claim.

For these reasons, the Court should deny Ben Adams and Philip Jackson's Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 29, 1997

Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

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No. 97-177

In the Supreme Court
of the United States

October Term, 1997

BEN ADAMS,
PHILIP JACKSON, Petitioners,

- versus -

CITY OF JERSEY CITY, Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for
the Third Circuit

PETITIONERS' REPLY
TO THE BRIEF IN OPPOSITION

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REPLY TO THE OPPOSITION TO CERTIORARI

Petitioners' Complaint pleaded for a first cause of action that the General Order reducing their rank and pay violated their "procedural and property rights." This assertion of both substantive and procedural claims was made at the outset of the case and has never been abandoned.

The case was dismissed without ever resolving Petitioners' substantive claims of improperly broken tenure. Instead, the courts below indulged Respondents' argument that the CBA arbitration procedure, which did not and could not resolve substantive tenure claims, provided all the process that was due. App. 21.

However this Court ultimately resolves the tension between CBA arbitration and statutory civil rights protections, the Petition presents an appropriate vehicle for making clear that civil rights claims which are beyond the scope of a CBA arbitration clause cannot be destroyed by the mere existence of that clause. Nothing written by Respondent is to the contrary.

A. At issue is job tenure, and not merely pay. Citing only to the district court's July 18, 1997 opinion,[1] Respondent asserts that "in count one, [Petitioners alleged that they] had been denied a property interest in receiving Detective's pay. (Pet. App. 11)." Opp. 1. In fact, the Complaint asserted that Petitioners both held "tenure in rank" as Detective, and were "entitled to the pay **and emoluments** of that office" (emphasis added). Respondent nevertheless tries to trivialize the Complaint as merely attacking elimination of the Detective pay differential. Opp. 11-12.

By emphasizing the pay differential component to the exclusion of the many other benefits of Detective status, Respondent makes the underlying dispute appear to fit within the terms of the CBA when it does not. This fundamental misunderstanding is also at the heart of the district court's opinion granting defendants summary judgment and of the Third Circuit's affirmance.

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[1] The Opposition is notable in that it cites repeatedly to the district court's opinion as authority for the correctness of the district court's decision. A more obvious case of trying to lift oneself by one's own bootstraps is hard to imagine.

The CBA provided a final pay step for those civil service Patrol Officers who were (non-civil service) Detectives, but it did not determine who was to be a Detective. See App. 37. Petitioners' entitlement to the rank and pay of Detective arose separate and apart from the terms of the CBA, and therefore could not be determined under the CBA. App. 34.

Petitioners' union would not advance their tenure claim because it was outside the arbitrator's jurisdiction; and if Petitioners had sought CBA arbitration on their own, the CBA's jurisdictional limitation would have made the resort to arbitration an exercise in futility. Consequently, Respondent's harping on the failure of Petitioners to pursue arbitration (Opp. 12) is utterly irrelevant to the merits and to this Petition. This is because the gist of the grievance was tenure, and for Petitioners, questions of pay would turn on the outcome of the tenure determination.

On the union's pay grievance, the CBA arbitrator correctly refused to reach the tenure issue. He explicitly recognized, "If there is a property interest, then the officer may have other rights but those are independent of his rights under the CBA." App. 9. The

courts below also refused to reach the tenure issue, believing that the mere existence of the CBA arbitration mechanism provided all the process that was due. Yet Respondent itself admitted that questions of tenure had to be resolved judicially. *See* Opp 12.

There was never a judicial resolution of the tenure claims raised in count one of Petitioners' Complaint. In essence, the arbitrator and the district judge each concluded that the other's forum was the appropriate one, leaving no forum whatsoever to hear the merits of Petitioners' tenure claim.

B. Respondent does not address the questions presented. The Opposition does not really speak to the two questions presented in the Petition. They are both important questions which potentially would have a jurisprudential impact upon a multitude of recurring disputes.

Question 1 is addressed to the interplay between *McDonald v. City of West Branch,* 446 U.S. 284 (1984), and *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991). Those cases, as well as the controversial decision in *Pryner v. Tractor Supply Co.,*

109 F.3d 354 (7th Cir. 1997) -- in which cross-petitions for certiorari are pending -- are not even mentioned by Respondent, except in one paragraph. Opp. 8. The argument offered there boils down to the following flawed syllogism: Because *federal courts* rather than the *CBA arbitrator* determined that the arbitration procedures comported with constitutional requirements, there can be no constitutional question for this Court to resolve.

To be sure, as Respondent asserts, consistent with Third Circuit doctrine the district court held that "`the role of the grievance/arbitration procedures is not to determine whether or not plaintiffs have been afforded due process. Rather, the role of the grievance/arbitration procedure is to afford plaintiffs with due process' (Pet. App. 21)." Opp. 8-9. The trial judge continued (Opp. 9): "In other words, the grievance/arbitration procedure is the process," and the Third Circuit agreed.

The quoted language, even if appropriate in other circumstances, begs the crucial issue presented as Question 2 in our Petition: Does a grievance/arbitration procedure which cannot and does not resolve tenure claims provide constitutionally adequate

protection for government employees whose tenure has been breached by administrative fiat? The answer to this question ought be self-evident, but it was completely overlooked in the courts below.

C. Count two and its waiver are not before this Court.

Respondent goes on at some length about count two of the Complaint. In the district court, Petitioner Jackson but not Petitioner Adams advanced count two. It challenged Petitioner Jackson's assignment to patrol duties by an October 23, 1989 Personnel Order, more than three months after the demotions from Detective which are at issue in count one. The trial court held that "Jackson's claim in Count 2 of the complaint was waived because he failed to set forth in the Revised Final Pretrial Order any facts he intends to prove regarding this." App. 11.

That holding was not challenged in the court of appeals. Therefore count two was no longer in the case, and nothing in count two could be or was questioned in the Petition.

Precisely because count two is not before this Court, arguments addressing that cause of action are wholly out of place. Nevertheless, Respondent repeatedly alludes to a "waiver" fatal to count two. For example, the caption to Opposition Point II asserts a waiver, but the only waiver mentioned in the accompanying text is that "Petitioner Jackson waived count two of the Complaint." Opp. 11. *See also* Opp. 9 (second full paragraph).

Worse, Respondent inexcusably and without citation to authority asserts that the waiver of count two waived everything, when there is no basis whatsoever in the record or in the law for that claim. Specifically, as to the Question 2 assertion regarding count one that Petitioners' tenure claim could only be resolved judicially but the judiciary refused to do so, Respondent offers the following concluding paragraph (Opp. 12):

> Finally, Petitioners assert that because the arbitrator did not address the issue of job tenure and Respondent's admission that the tenure claim could only be resolved judicially, they have been denied due process. (Pet. Cert. 25). Petitioners, however, fail to advise the Court that Petitioner Jackson waived this claim through

> his inability to comply with the Pretrial Order. Consequently, the Petitioners have not suffered a deprivation of due process.

Obviously, objections to the singular error in the decisions below -- that under Third Circuit doctrine, no impartial tribunal is competent to adjudicate the tenure claims in count one -- were not waived by Petitioner Adams when Petitioner Jackson elected not to go forward on count two, to which Adams was not even a party. And Petitioner Jackson's abandonment of count two did not and could not waive his claim on count one, which is the only cause of action the Petition addresses.

D. The defense on the merits of the tenure claims is weak. Respondent argues the merits of the tenure claims, instead of the merits of the Petition. Specifically, it asserts technical defenses to George Act tenure. Opp. 3.

While the ultimate merits are beyond the scope of this Petition, the asserted defenses are extremely dubious. In its first decision, the trial court correctly recognized that those defenses rest on disputed facts and must be tried. App. 30-31. Furthermore, the

CBA provision for premium Detective pay and the continuing funding of Detective salaries certainly was known to and authorized by the City Council. This should be dispositive, because under New Jersey law, it works a ratification by City Council of Petitioners' "permanent" appointments as Detectives. *Cf. Casamasino v. City of Jersey City*, ___ N.J. Super. ___, 1997 N.J. Super. LEXIS 368, *6-*8 (App. Div. Sept. 2, 1997) (holdover Tax Assessor acquired tenure without formality of City Council vote).

E. The Third Circuit in fact bars all § 1983 employment claims by unionized workers. Respondent argues (Opp. 7):

> Nothing in the *Dykes* [*v. SEPTA,* 68 F.3d 1354 (3d Cir. 1995, *cert. denied*, 116 S.Ct. 1434 (1996)] holding creates a presumption, as alleged by Petitioners, that all municipal grievance procedures established by a collective bargaining agreement satisfy constitutional requirements, and obviate the need for case-by-case review."

While *Dykes* does not make this presumption explicit, application of the *Dykes* doctrine has closed Third Circuit courts to § 1983 claims by unionized municipal employees. The court below

had a clear opportunity in this case to acknowledge that for the issue of Detective tenure which Petitioners raised, the CBA simply is not "an *adequate* grievance/arbitration procedure" for purposes of satisfying Fourteenth Amendment requirements. Opp. 6, *quoting Dykes,* 68 F.3d at 1564 (Respondent's emphasis). The court of appeals' acceptance of the trial court's analysis therefore is tantamount to an admission that *Dykes* creates an irrebuttable presumption foreclosing all § 1983 claims by unionized municipal employees.

Conclusion. For the foregoing reasons and those previously stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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Of counsel: Susan E. Babb

Dated: September 19, 1997.